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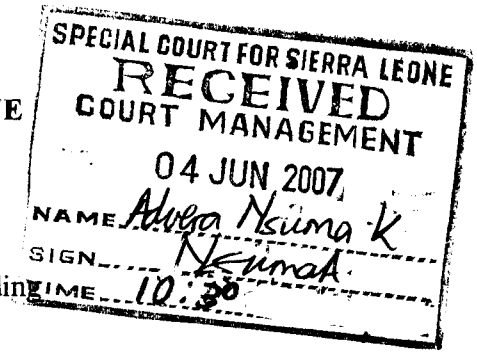

THE SPECIAL COURT FOR SIERRA LEONE

In Trial Chamber II

Before: Justice Julia Sebutinde, Presiding
Justice Richard Lussick
Justice Teresa Doherty
Justice El Hadji Malick Sow, Alternate

Registrar: Mr. Herman von Hebel, Acting Registrar

Date: 4 June 2007

Case No.: SCSL-2003-01-~~PT~~

THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC

DEFENCE MOTION TO EXCLUDE, AND IN THE ALTERNATIVE, LIMIT THE ADMITTANCE OF STEPHEN ELLIS' TESTIMONY AND EXPERT REPORT

Office of the Prosecutor
Mr. Stephen Rapp
Ms. Brenda J. Hollis
Mr. Mohamed Bangura
Ms. Wendy van Tongeren
Ms. Ann Sutherland
Ms. Shyamala Alagendra
Mr. Alain Werner
Ms. Leigh Lawrie

Counsel for Charles Taylor
Mr. Karim A. A. Khan

Introduction

1. The Defence for Charles Taylor (the "Defence") respectfully request that the Trial Chamber (the "Chamber"") exclude, or in the alternative, limit the scope of Mr. Stephen Ellis' expert report and testimony as an expert witness. Mr. Ellis' Report and intended testimony, given Mr. Ellis' historical relationship with Mr. Taylor, is inherently biased. The report and his intended testimony exceed his expertise, in both capability and subject matter, as an expert witness, transgress the province of the trier of fact – the Chamber – in addressing itself wholly and in significant part to ultimate issues, presents factual evidence via proxy, lacks a reasonable basis for the expert testimony in many instances, and is irrelevant in some instances. The Chamber, pursuant to Rule 89 (C) and 95, and consistent with the jurisprudence on expert witnesses, is requested to declare Mr. Ellis expert report and intended testimony inadmissible in their entirety, or in the alternative, to limit the expert report and intended testimony to the area of Mr. Ellis' expertise – a rapporteur of events in Liberia.

II. Jurisdiction

2. The Chamber, pursuant to Rule 89 (C) and Rule 95, performs a gatekeeping function vis-à-vis expert reports and testimony. The Special Court's Rules on expert witnesses, in contrast to the ICTR and ICTY rules, do not specify a methodology for qualification of an expert.[1] Nevertheless, the Chamber, in ensuring that experts comply with the statutory and customary definition of experts,[2] is able to exercise its inherent discretionary powers to proscribe evidence.[3] ICTR jurisprudence is persuasive in stating that "[...]there is no

[1] *See Prosecutor v. Brima et al.*, Case No. SCSL-04-16-T-365, Decision on Prosecution Request for Leave to Call an Additional Witness (Zainab Hawa Bangura) Pursuant to Rule 73 *bis* (E), and on Joint Defence Notice to Inform the Trial Chamber of its Position vis-à-vis the Proposed Expert Witness (Mrs. Bangura) Pursuant to Rule 94*bis*, 5 August 2005, para. 30. (The majority considered the merits of the Defence objections, despite declaring that the rules did not provide them a means to do so).
[2] *Id.*, para. 23 ("... "Expert means a person referred to as such in Article 15 of the Agreement establishing the Special Court and appearing at the instance of the Special Court, a suspect or an accused to present testimony based on specialised knowledge, experience or training.")
[3] *See Prosecutor v. Brima et al.*, Case No. SCSL-04-16-T-420, Separate and Concurring Opinion of Justice Doherty on Prosecution Request for Leave to Call An Additional Witness Pursuant to Rule 73*bis* (E) and Joint Defence Application to Exclude the Expert Evidence of Zainab Hawa Bangura or Alternatively to Cross-Examine her Pursuant to Rule 94*bis*, 21 October 2005, para. 52.

dispute that before being permitted to submit opinion testimony, the Court must find that the expert is competent in her proposed field or fields of expertise."[4] Without the ability to proscribe or limit expert witnesses, the Chamber would be unable to effectuate the provisions defining expert vis-à-vis factual witnesses. Such matters are not merely considerations of weight, but of admissibility.

3. The Defence have previously provided notice, pursuant to Rule 94*bis*, that Mr. Ellis' Reports is not accepted.[5]

4. The Defence note that contrary to the Acting Registrar's submissions to the Chamber on 28 May 2007, undertaking in writing that the Defence would be served, via CD on 30 May 2007, a copy of all filings until 25 May 2007, the Defence have not been served with the CD.[6] Consequently, the Defence are yet to be served, electronically or physically, the Prosecution Motion, filed 15 May 2007, filing five expert reports, including that of Stephen Ellis, pursuant to Rule 94*bis*.

III. Applicable Law

5. The Special Court's jurisprudence on the issue of experts is perhaps best articulated by Justice Doherty, when she states:

> "For the report of an expert to be admissible, four core elements must be fulfilled:
>
> (a) The subject matter must be proper subject for expert evidence;
>
> (b) The evidence must be capable of assisting the Trial Chamber to determine the issue in dispute;
>
> (c) The person purporting to be an expert must have the necessary qualifications and used proper methods in their research;

[4] *Prosecutor v. Bagasora et al.*, Case No. ICTR-96-7-T, Oral Decisions on Defence Objections and Motions to Exclude the Testimony and Report of the Prosecution's proposed Expert witness, Dr. Alison Des Forges, or to Postpone her Testimony at Trial, September 4, 2002, para. 5

[5] *Prosecutor v. Charles Ghankay Taylor,* Case No. SCSL-2003-01-PT-267, Notice Under Rule 94*bis* (B), 29 May 2007.

[6] *Prosecutor v. Charles Ghankay Taylor,* Case No. SCSL-03-01-PT-259, Registrar's Submissions Pursuant to Rule 33 (B) relating to the Defence Motion Pursuant to Rule 54 Requesting Order to Court Management to Accept Filings and Serve Hard Copies or all Filings on the Parties in The Hague Immediately, 28 May 2007, 28 May 2007, para. 7.

(d) The person purporting to be an expert must be independent and impartial.[7]

6. The Prosecutor has the burden of demonstrating the qualifications of an expert witness, and the expert witness' relevance and probative value.[8]

IV. BIAS

7. The Defence respectfully submit that the lack of neutrality of an expert is grounds for non-admittance. As stated by Justice Doherty, "the expert does not take the side of any party."[9] There are reasonable grounds to believe that Mr. Ellis bears personal enmity towards to Mr. Taylor. Mr. Taylor, responding to allegations in Mr. Ellis' book, "The Mask of Anarchy," filed libel actions in London against Mr. Ellis's publisher.[10] Mr. Ellis can surely not be the dispassionate expert testifying on his purported specialised knowledge that the law expects.

V. MR. ELLIS TRESPASSES THE CHAMBER'S COMPETENCE TO DETERMINE "ULTIMATE ISSUES"

8. Mr. Ellis' Report, in its entirety, invades deep into the realm of the Chamber as the trier of fact. In most jurisdictions, as reiterated at the Special Court:

> "Expert evidence must be fact and information outside the ordinary experience and knowledge of the Trial Chamber. It is for the Trial Chamber to make findings of fact, the expert is to assist, not take over, that role."
>
> "An expert must not offer an opinion on the 'ultimate issue' in a case, that is for the Trial Chamber to consider and determine."[11] (emphasis added)

Thus, the Chamber should exclude expert testimony on ultimate issues that it is the Chamber's mandate and competence to adjudicate.

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[7] *Prosecutor v. Brima et al., supra note 3,* para. 52.
[8] *Prosecutor v. Bizmungu et al.,* ICTR Case No. 99-50-T, Oral Decision on Qualification of Prosecution Expert Jean Rubaduka, 24 March 2005.
[9] *Id.,* para. 61. *See also Prosecutor v. Kajelijeli,* Case No. ICTR-98-44-T, Judgement, 1 December 2003, paras 63, 81 (the Chamber declined to consider qualified expert that was "not neutral").
[10] The Perspective, Taylor May Testify in London in Libel Case, httptp://www.theperspective.org/libel.html. It is noteworthy that Mr. Ellis, in his report and curriculum vitae, fails to mention the fact that he was party to litigation with Mr. Taylor.
[11] *Prosecutor v. Brima et al., supra note 3,* paras. 53 and 54.

9. Mr. Ellis' report, and his intended testimony, reaches unsupported conclusions that trespass on the Trial Chamber's role as the trier of fact. In *Kordic and Cerkez,* a book was excluded because it was "littered [...] with examples of conclusions, drawing inferences" that interfered with the ICTY Trial Chamber's duties to make its own assessments of fact and law.[12] A report, commissioned to explore "Charles Taylor and the War in Sierra Leone," the primary question of fact to be determined by the Chamber is such a transgression. The contents of the report are no improvement on its title. For instance, the report concludes with no supporting evidence that "[t]he weight of the evidence suggests that President Taylor paid close personal attention to relations with the RUF, and that he supervised the trade in diamonds from Sierra Leone to Liberia, notwithstanding his statements to the contrary."[13] The Prosecutor's Pre-Trial Brief is unsurprisingly consistent, and states that an element that the Prosecutor intends to prove is that the "RUF, Junta, and AFRC/RUF gave the Accused diamonds obtained from Sierra Leone for arms, ammunition and other supplies which he provided."[14] In another example of interference with the trier of fact's province to determine ultimate issues of fact, the report alleges that Mr. Taylor "aided the RUF from its inception."[15]

VI. MR. ELLIS' REPORT DOES NOT HAVE A REASONABLE BASIS

10. While ancient Romans may have convicted solely on blind faith in experts, the evolution of jurisprudence since then requires that opposing parties and the trier of fact is able to consider the rationale underlying the experts' opinions, which must be reasonable.[16] Using expert evidence to introduce unreliable hearsay by proxy is not considered acceptable.

11. Mr. Ellis' report relies primarily on secondary sources. Further, even his primary sources are not reliable. Although in his methodology, he suggests

[12] *Prosecutor v. Kordic and Cerkez,* ICTY, Case No. It-95-14/2, Transcript, 28 January 2000.
[13] Stephen Ellis, Charles Taylor and the War in Sierra Leone. p. 11.
[14] *Prosecutor v. Charles Ghankay Taylor,* SCSL-2003-01-T-218, Pre-Trial Brief, 4 April 2007, para. 53.
[15] Ellis, *supra note 12,* p. 18.
[16] *See* United States Federal Rules of Evidence, section 705.

that primary sources include "oral statements made by persons directly implicated, either in discussion with the present author or recorded by others[,]"[17] he cites only three primary interviews, while his report contains 93 footnotes. His other primary sources explained in his methodology – reports of the committee of experts, documents "compiled or published by the Sierra Leonean and Liberian governments," internet resources or "newspapers" hardly constitute primary sources, and are in fact secondary. Indeed, the citations to United Nations committee of experts, in itself a report relying heavily on secondary sources such as Mr. Ellis, leads to circular amplication of the same "facts", but does not increase their indicia of reliability, or in any way corroborate the facts.

12. Mr. Ellis' Report further relies heavily on, as a primary source, the Sierra Leonean Truth and Reconciliation Commission's conclusions. The Truth and Reconciliation Commission is not a primary source. Such commissions are not intended to be primary sources of expert reports on primary issues. They work by hearing reports of human rights abuses and considering amnesty applications; they have not been proved to meet the standard required for admittance by a criminal court. It is inadequate and insufficient for Mr. Ellis to merely cite the Truth and Reconciliation Commission report as the rationale for this own inferences. They do not constitute a primary source.

13. Secondary information is inadmissible as expert evidence, in light of the impossibility for corroboration or cross examination of the source by opposing counsel; the inability to assess the professional competence of the secondary source; and the methodologies used. Mr. Ellis' report, but for the three primary interviews, and some original documents, relies solely on secondary sources. The conclusions of journalists and others, the overwhelming majority of Mr. Ellis rationale or basis for his report, have no more evidential force before this Chamber than staging a showing of the movie *Blood Diamond* before a court. Indeed, Mr. Ellis actually cites a book by Ian Fleming, the

[17] Ellis, *supra note 12*, p. 1.

author of James Bond books, and hardly a reasonable basis for a report in a case concerning such grave allegations.[18]

14. Mr. Ellis does further disservice to his methodological claims on assessing credibility. He uses, no less than 15 times, a book published by Amos Sawyer.[19] Mr. Sawyer, a former Liberian Interim President, is both an active participant in Liberian politics – he commanded a faction during the civil war and still serves in the current Liberian administration, but a long term opponent of Mr. Taylor. Although relevant, and perhaps a witness on his account, he is hardly a source deserving of the credibility and weight that Mr. Ellis accords him in reaching his own purportedly expert inferences.

15. Thus, Mr. Ellis's report does not have a reasonable basis for its inferences or conclusions. Reliance on a few primary sources is hardly sufficient, and the remainder, despite the taxonomy used by Mr. Ellis, are problematic secondary sources.

VII. MR. ELLIS SEEKS TO INTRODUCE HEARSAY FACTUAL TESTIMONY

16. Experts are not prescient witnesses, and must not testify to factual issues whereby they introduce information via hearsay. As stated by Justice Doherty:

> "...the expert differs from a witness of fact who is called to attest on the accused's involvement in any alleged offense."[20]

In *Semanza,* the Trial Chamber discounted the expert witness Mr. Ndengejeho's testimony as it was based on information relayed to him from "unidentified sources" and lacked sufficient detail to be reliable.[21] Mr. Ellis' report is similarly, when rarely reliant on supposedly reliable primary sources, merely an introduction of anonymous witness statements that cannot be

[18] Ellis, *supra note 12,* fn. 34.
[19] *Id.,* fn. 16.
[20] *Prosecutor v, Brima et al., supra note 3,* para. 61.
[21] *Prosecutor v. Semanza,* ICTR Case No. ICTR-97-20-T, Judgement, para. 279.

evaluated or assessed for reliability or corroboration. The Defence respectfully submits that such introduction of fact statements via proxy, requiring no analysis from the purported expert, should not be allowed.

VIII. MR. ELLIS' REPORT EXCEEDS THE SCOPE OF HIS EXPERTISE AS A HISTORIAN OF LIBERIA

17. The testimony of an expert is admissible "only to the extent that the testimony comes within the scope of the witnesses expertise."[22] The ICTR Trial Chamber in *Bizimungu* limited Dr. Nowrojee's testimony and report to Dr. Nowrojee's field expertise of "investigation of sexual violence in Rwanda."[23] In the same ICTR Trial Chamber, Mr. Jean Rubaduka, a judge on the Rwandan Supreme Court, was not qualified as an expert on the topic of Rwandan constitutional law, because he had participated only in administrative decisions. The ICTR Trial Chamber considered it dispositive that Mr. Rubaduka had published no scholarly works on Rwandan constitutional law. The Defence does not contest that Mr. Ellis is a historian, who has researched and written extensively on Liberia. However, the subject matter of his report geographically exceeds his expertise – it crosses into Sierra Leone - as indicated from his reliance almost solely on secondary sources. Mr. Ellis is neither a historian, nor a published author of any work, on Sierra Leone. His report and intended testimony exceeds the scope of his expertise, and should be excluded.

IX. CONCLUSION

18. Mr. Ellis' Report and intended testimony is inconsistent with the role of expert witnesses as providing assistance, from an expertise acquired through education, experience or training. No doubt that Mr. Ellis is a historian, and in that capacity, an expert on Liberia. His expertise, however, is not the subject matter of his report or intended testimony. Further, Mr. Ellis' report, in its

[22] *Prosecutor v. Bizimungu et al.*, ICTR Case No. ICTR-99-50-T, Decision on the Admissibility of Dr. Binafair Nowrojee, para. 11.
[23] *Id.*

entirety, transgresses the province of the Chamber as the trier of fact, for it concerns itself with conclusions that are ultimate issues in this case. Mr. Ellis basis for these inferences is unfounded and unreliable, and being largely anonymous or secondary, not open to examination by either the Chamber or the Defence. Lastly, Mr. Ellis, a prior litigant in libel action filed by Mr. Taylor, a fact he fails to disclose, cannot claim neutrality, an indispensable requirement for expert witnesses.

19. Consequently, the Defence hereby request the Chamber to:

1) Exclude Mr. Ellis expert report, titled "Charles Taylor and the War in Sierra Leone", and his intended testimony.
2) In the alternative, limit his report to his expertise, devoid of any conclusions on the ultimate issue, where he can show that he has a reasonable and verifiable basis for his conclusions.

Respectfully submitted,

Karim A. A. Khan
Lead Counsel for Mr. Charles Taylor
Dated this 4th Day of June 2007

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